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No. 82-1832

In The

Supreme Court of the United States

October Term, 1982

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON,

Petitioners,

vs.

CITY OF EAU CLAIRE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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FREDERICK W. FISCHER
City Attorney
City of Eau Claire
City Hall
203 South Farwell Street
Eau Claire, Wisconsin 54701
(715) 839-4907

Attorney for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

The question presented on this petition is as follows:

> "Is the practice of the City of Eau Claire to refuse to provide sewer utility services to properties located outside the City, and requiring annexation of such properties in order for them to receive such services, exempt from the application of the antitrust laws under the state action doctrine?"

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OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals appears in 700 F. 2d 376 (1983).

STATEMENT OF THE CASE

The four Petitioners, the Towns of Hallie, Seymour, Union and Washington, lie adjacent to the City of Eau

Claire. The city constructed a sewage treatment facility with federal funds. This facility is the only sewage treatment facility which is in the market available to the towns. The district and appellate courts found that the providing of sewer service has three elements: collection, transportation and treatment. The towns are potential competitors for the sale of sewage collection and transportation services in the same market. The city refuses to provide treatment services to the towns, requiring instead that properties desiring sewer service must be annexed into the city. This practice is alleged by the towns to be contrary to Section 2 of the Sherman Act (15 USC Section 2). Suit was filed in District Court, Western District of Wisconsin. The city moved to dismiss the action, claiming, among other things, that its activity was exempt under the "state action" doctrine first enunciated in *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307 (1943).

ARGUMENT

I.

The Seventh Circuit Was Correct In Determining That The Refusal Of The City To Extend Treatment Services To The Towns Was Pursuant To The Clearly Articulated And Affirmatively Expressed Policy Of The State Of Wisconsin.

In their Petition, the petitioning towns contend that the Seventh Circuit Court of Appeals erred in: 1) not finding that the state affirmatively addressed and clearly expressed a state policy displacing competition with monopoly public service; and 2) by supposedly developing a "new test" for determining exemption from the antitrust laws, "which accepts state neutrality as sufficient" and is thereby in "direct conflict" with the court's holdings in *City of LaFayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 98 S. Ct. 1123 (1978), and *Community Communications Co. v. City of Boulder*, 445 U. S. 40, 102 S. Ct. 835 (1982). (p. 11, Petition).

This case involves the simple matter of whether or not a municipality can refuse to extend municipal sewer service to surrounding towns without violating the Sherman Act. Contrary to Petitioners' assertions (p. 11, Petition), the Court of Appeals expressly answered the issue of whether or not this practice was pursuant to an affirmatively expressed and clearly articulated state policy. The Seventh Circuit, following an analysis of the pertinent Wisconsin statutory and case law, affirmatively held as follows:

> "We hold that the conduct of the City in refusing to provide these services meets the standards of the *City of Boulder* requiring that the anticompetitive conduct was in furtherance of clearly articulated and affirmatively expressed state policy." (App. 14, Petition).

The Petitioners allege that the foregoing finding provides antitrust exemption to the Respondent under a "neutral" state policy. However, the Seventh Circuit, rejecting Petitioners' claim that state compulsion or direction is required for exemption, properly determined that Wisconsin state law affirmatively contemplated and authorized the city's challenged practice, thus exempting it from antitrust scrutiny.

The City's refusal to extend its services extraterritorially was found by the Seventh Circuit to have been contemplated and authorized by state law. In *City of LaFayette,* the Supreme Court rejected the contention "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit". (Referring to *Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307 (1943)). The court held that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". *City of Boulder* confirmed this holding, noting that, in order for exemption, the challenged municipal act must be "contemplated" and "comprehended within the powers granted". 102 S. Ct. at 843. The court, in *City of Boulder,* quoting with favor from the decision of the Court of Appeals in that case, described the applicable standard as follows:

> "(I)t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to act in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, . . . the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. . . . A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent". 102 S. Ct. at 840, n. 12 (quoting *City of LaFayette v. Louisiana Power & Light Co.,* 532 F. 2d 431, 434-35 (5th Cir. 1976)).

The question is thus whether or not the Wisconsin legislature contemplated or comprehended the activity of the City of Eau Claire, and can be answered by a review of state statutory and case law. Two statutes, in particular, and a Wisconsin Supreme Court case involving virtually identical facts, were found to provide ample state authorization.

Section 66.069 (2) (c), Wisconsin Statutes (App. 29, Petition), explicitly recognizes the right of a city to fix the limits of sewer service, which is the same conduct with which Petitioners take issue. This statute expressly permits a city to confine the providing of any sewer service to the city boundary. It clearly contemplates and authorizes the precise action which is challenged here, that a municipality may determine not to extend its services extraterritorially. As the Seventh Circuit noted, "this statute authorizes the City to fix the limits of its utility service".

Wisconsin Statutes 144.07 (1m) was determined by the Court of Appeals to constitute further evidence of state policy. (The text of the statute is contained in App. 29-30, Petition). This statute provides that the state department of natural resources may order extension of the city's sewage system to a town, but if the area subject to the order thereafter refuses to be annexed to the city, the order becomes void and the city is not obligated to extend its system. This statute provides further evidence of legislative contemplation of the contested activity of the city. In the words of the

Seventh Circuit, it "is evidence of a state policy to require annexation as a condition to receiving municipal services".

Section 144.07 (1m) was upheld in *City of Beloit v. Kallas*, 76 Wis. 2d 61, 250 N. W. 2d 342 (1977), the Wisconsin Supreme Court holding that the statute balanced and accommodated two matters of statewide concern: providing vital services to areas surrounding cities, and the growth and expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.[1]

In a case not even mentioned by Petitioners, *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N. W. 2d 321 (1982), the Wisconsin Supreme Court provided still further, emphatic support for the City's policy.

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[1]In *City of Beloit* the court made the following revealing comment as to the problem underlying intergovernmental disputes over annexation and the extension of sewer service, and the reason behind the enactment of section 144.07(lm):

> "All of the major cities and most of the smaller cities and villages in Wisconsin are surrounded by fringe areas with population densities at or near the normal city level. Even though these fringe areas appear to be a part of the city, they are governed, taxed and provided services by the town. No populated fringe area may become part of the city until a majority of the electors and/or property owners in a particular area desire to annex. Cities and villages invariably offer a higher level of services to their citizens as compared to the surrounding town, and almost without exception it follows that costs of municipal services are correspondingly higher. The argument of the cities is that if the surrounding areas can attain the desired city services without becoming a part of the city, the growth of the cities is likely to be forever stifled, and the residents of metropolitan areas will be forever carrying an inequitable percentage of the tax load. 250 N.W. 2d at 346.

That case arose under the Wisconsin "Little Sherman Act" (Wisconsin Statutes 133.01, et seq.) on facts which were essentially the same as those presented here. The court, citing sections 66.069 (2) (c) and 144.07 (1m) and the general home rule powers of Wisconsin cities, concluded that:

> ". . . it seems that the legislature viewed annexation by the city as a reasonable quid pro quo that a city could require before extending sewer services to the area." 314 N. W. 2d at 325.

The decision went so far as to specifically hold:

> ". . . a monopoly exercised by the city is more appropriate than competition in the furnishing of such public services, . . ." 314 N. W. 2d at 326.

This case could not have been more explicit as to the legislative contemplation of the city's polic

The towns concede that the foregoing statutes "give cities the authority to engage in conduct which may or may not have anticompetitive effects" (p. 15, Petition). They have likewise abandoned their contention asserted below that legislative direction or compulsion must be present in order for exemption from the Sherman Act. The towns nevertheless argue that under the foregoing general legislative authority, the city is given the option of engaging or not engaging in anticompetitive conduct. They would require that the legislature specifically authorize the anticompetitive conduct itself. This allegation was rejected by the appellate court, the court noting that in *City of LaFayette*, the Supreme Court explicitly stated that no "specific detailed legislative authorization" is required for exemption. All that is required is a determination, from the authority given, that

"the legislature contemplated the kind of action complained of". This test has been reiterated in *City of Boulder,* 102 S. Ct. at 840, n. 12. Moreover, the presumed test espoused by the Petitioners goes too far and would seem to violate the admonition in *California Retail Liquor Dealers v. Midcal Aluminum,* 445 U. S. 97, 100 S. Ct. 937 (1980) (quoting *Parker v. Brown*):

> ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their action as lawful. . . ."

II.

The Decision Of The Court Of Appeals Does Not Accept State Neutrality As Sufficient For Immunity.

The Court of Appeals properly found that the state policy evidenced by the foregoing authority is more than the "mere neutrality" which was found to be insufficient in *City of Boulder.* In *City of Boulder,* there was no "grant" of any specific power by the state to the city and thus no contemplation or authorization of anti-competitive activities. The Supreme Court found "the absence of any regulation whatever by the State of Colorado". As noted by the dissent in the Court of Appeals in *City of Boulder:*

> "No state policy whatsoever exists in relation to cable TV. The subject is not mentioned in Colorado's Constitution or in any state statute. The Colorado Public Utilities Commission has declined to exercise jurisdiction over cable". 630 F. 2d 704, 717 (10th Cir. 1980).

In fact, the City of Boulder had argued that "as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act". 102 S. Ct. at 843.

Here, to the contrary, the Wisconsin statutory and case law cited previously is definitely not "neutral". It constitutes an express grant of authority to the city to engage in the challenged activity. The previously cited statutes and the decision of the Wisconsin Supreme Court in *Town of Hallie v. City of Chippewa Falls,* (supra) belie the concept of neutrality. *Town of Hallie* even held that "the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city". Far from neutrality, the Wisconsin legislative scheme affirmatively contemplates and supports the activity of the City of Eau Claire.

The Petitioners further claim that, under the Seventh Circuit's test, the City of Boulder would have been immune from the Sherman Act (p. 15, Petition). This allegation is misplaced and fallacious. In *City of Boulder,* no statutes or cases concerning cable television existed from which legislative authorization or contemplation could be inferred. The city instead relied entirely upon its general home rule authority, thus prompting the finding of neutrality. However, if facts similar to those in this case had been present in *City of Boulder,* the City submits that the outcome would have been different. If Colorado statutes had existed which contemplated and authorized the imposition of cable television moratoriums and the Colorado Supreme Court had held that those laws constituted legislative intent in support of such moratoriums, the state policy would no longer have been neutral. It would then have been clearly articulated and affirmatively expressed, thus conferring immunity.

III.

The Finding Of "Clear Articulation And Affirmative Expression" By The Court Of Appeals Is Expressed By Other Post-Boulder Decisions.

Since *City of Boulder* was decided, several decisions have been rendered, at the trial and appellate levels, which comport with the reasoning of the Seventh Circuit. *Pueblo Aircraft Service, Inc. v. City of Pueblo,* 679 F. 2d 805 (10th Cir. 1982), cert. den., 51 Law Week 3509; *Euster v. Eagle Downs Racing Association,* 677 F. 2d 992 (3rd Cir. 1982), cert. den. — U. S. —, 103 S. Ct. 388 (1982); *Gold Cross Ambulance v. City of Kansas City,* 538 F. Supp. 956 (W. D. Mo. 1982); *All-American Cab Co. v. Metropolitdn Knoxville Airport Authority,* 547 F. Supp. 509 (E. D. Tenn. 1982); *Hybud Equipment Corp. v. City of Akron,* Nos. C78-1733A, C78-65A (D.C. N. D. Ohio, April 6, 1983). In each of these cases the state legislative delegation was less precise and specific than in the instant action. *City of Pueblo,* for example, involved a Colorado home rule municipality which undertook to limit the number of fixed base operators at its airport. The statute involved was nothing more than a general enabling act permitting Colorado cities to operate and maintain airports. No mention whatever was made in the statute concerning the limitation of the number of fixed base operators at a municipal airport. The statute was nevertheless found to be clearly articulated and affirmatively expressed state policy and the activity was exempt under the Sherman Act.

As evidenced by the denial of certiorari in two of these cases, *City of Pueblo* and *Euster,* the rationale of the cases appears consistent with *City of LaFayette* and

City of Boulder. The decision of the Seventh Circuit in this action is likewise consistent.

IV.

The Decision Of The Seventh Circuit Does Not Conflict With Ronwin.

Petitioners claim that the finding in *Ronwin v. State Bar of Arizona,* 686 F. 2d 692 (9th Cir. 1982) is inconsistent with that of the Seventh Circuit. *Ronwin,* however, was a case where the alleged anticompetitive conduct, permitting a predetermined number of bar applicants to pass the bar exam, was not contemplated or authorized as state policy. In this regard, the Respondent strongly disagrees with Petitioners' claim that it was "foreseeable", judging from the general power over bar admittances delegated to the committee, that the committee would thereby admit only a given number of applicants regardless of achievement. The court in *Ronwin* specifically found that "the challenged restraint was not adopted or directly authorized by the Arizona Supreme Court". The court concluded that "the challenged grading procedure was not clearly articulated or affirmatively expressed as state policy".

The court engaged in a significant discussion as to the apparent existence of an Arizona Supreme Court Rule on grading and a claim that the committee had advised the Supreme Court of its grading policy under this rule. The court refused to consider these facts, but noted:

> "Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention."

The decision of the Seventh Circuit is not inconsistent with *Ronwin*. In *Ronwin* no state policy existed (or at least none existed which the court was willing to recognize) which contemplated or sanctioned the challenged grading practice. Had such a policy been in existence, as evidenced by that part of the Ninth Circuit's opinion cited immediately above, immunity would likely have been granted.

As of May 17, 1983 the Supreme Court granted certiorari in *Ronwin* (now *Hoover v. Ronwin*, 51 Law Week 3825). Thus the court will be able to address the question of the degree of specificity in the grant of state authority which is required in order to qualify for state action immunity. However, whether under the rationale expressed in *Ronwin* or in the other cases cited previously, the grant of state authority in the instant case is sufficient to confer immunity.

V.

Active State Supervision Should Not Be Required, At Least Where Traditional Municipal Functions Are Concerned.

No case previously decided by this court has held that the "active state supervision" requirement of *California Retail Liquor Dealers v. Midcal Aluminum*, (supra) applies to local governmental activities. *Midcal* was concerned with the unsupervised activity of *private* liquor dealers. *City of Boulder* expressly reserved the question "whether the ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*". 102 S. Ct. at 841, n. 14. The dissent in *City of Boulder* recognized

the peculiarity which would result if active state supervision were required of ordinances dealing with local affairs. 102 S. Ct. at 851, n. 6, Justice Rehnquist dissenting. As noted by the Seventh Circuit, active state supervision would be particularly anomalous when a traditional municipal function is involved. If the challenged activity is a traditional municipal activity and authorized by a clearly articulated and affirmatively expressed state policy, which by all accounts is required, active state supervision is unnecessary. Such supervision is also undesirable and unwise due to the resulting erosion, if not outright elimination, of home rule authority and local autonomy in local affairs. In order to eliminate antitrust exposure, all local activities would have to be actively supervised by the state, a concept totally at odds with the idea of local autonomy and home rule. Finally, the courts would be faced with deciding the thorny issue of how much state control constitutes "active supervision" of any given municipal activity.

The holding of the Seventh Circuit has found support in other cases arising since *City of Boulder*. In *Pueblo Aircraft Service, Inc.* (supra), no active state supervision was required in order for immunity to attach. As previously noted, certiorari has been denied in this case. *City of Akron* (supra) is likewise in accord, the district court citing the Seventh Circuit's decision.

VI.

The Decision Of The Seventh Circuit Is Consistent With The Boulder Decision And Does Not Create A "Serious Chink" In The Antitrust Laws.

The Petitioners claim that the decision of the Seventh Circuit results in granting "special status" to local

units of government, leaving them "free to make economic choices" which are contrary to the antitrust laws (pp. 20-21, Petition). However, this contention is essentially an argument against the state action exemption itself. The Petitioners' claim loses sight of the fact that, under the state action doctrine, a state may legitimately authorize local governments to make anticompetitive decisions which would otherwise be contrary to the antitrust laws. As long as the municipal action is pursuant to a clearly articulated and affirmatively expressed state policy it is immune from antitrust challenge. The decision of the court of appeals is consistent with this requirement. The court's decision does not constitute a test of "neutrality" but instead requires the affirmative state recognition of municipal power and authority to act in an anticompetitive manner. The spectre raised by Petitioners that the Seventh Circuit decision will permit "thousands upon thousands" of local governments to violate the antitrust laws with impunity is completely inaccurate and utterly without merit. Such a consequence will be no more possible under the decision of the Seventh Circuit than under *City of LaFayette* and *City of Boulder*.

CONCLUSION

Based upon the foregoing, the Respondent City of Eau Claire respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FREDERICK W. FISCHER
City Hall
203 South Farwell Street
Eau Claire, Wisconsin 54701
Telephone (715) 839-4907

Attorney for Respondent
City of Eau Claire